Service Date: February 28, 2000

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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| IN THE MATTER OF the Application of | ) | UTILITY DIVISION |
| McLeodUSA Telecommunications, Inc. and | ) | |
| U S WEST Communications, Inc. | ) | DOCKET NO. D99.11.252 |
| Pursuant to Section 252(e) of the | ) | |
| Telecommunications Act of 1996 for | ) | ORDER NO. 6230 |
| Approval of their Resale Agreement | ) | |

# FINAL ORDER

## Introduction and Procedural Background

1. On February 8, 1996, the Telecommunications Act of 1996 (1996 Act)[1] was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to local exchange markets. The 1996 Act sets forth methods by which local competition may be encouraged in historically monopolistic local exchange markets. The 1996 Act requires companies like U S WEST Communications, Inc. (U S WEST) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251 and 252.

2. U S WEST Communications, Inc. (U S WEST) has entered into a resale agreement with McLeodUSA Telecommunications, Inc. (McLeod) for resale of U S WEST services according to the 1996 Act. U S WEST filed the parties agreement, entitled "Resale

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

Agreement Between U S WEST Communications, Inc. and McLeodUSA Telecommunications, Inc. for Montana" (Agreement) with the Montana Public Service Commission (Commission) on November 17, 1999. The Agreement was docketed as D99.11.252 and it provides for McLeod to resell U S WEST□s local exchange services in Montana.

3. On November 19, 1999, the Commission issued a Notice of Application for Approval of Resale Agreement and Opportunity to Intervene and Comment, giving public notice of the requirements that the Commission approval of the filing be nondiscriminatory toward other telecommunications carriers not parties to the agreement and be consistent with the public interest, convenience and necessity. The notice stated that no public hearing was contemplated unless requested by an interested party by December 3, 1999. The notice further stated that interested persons could submit limited comments on whether the agreement met these requirements no later than December 13, 1999.

4. No hearing has been requested and no comments or requests for intervention received in regard to the McLeod Agreement. The McLeod Agreement is substantially the same as previously approved interconnection agreements between U S WEST and other competitive local exchange carriers (CLECs). The Commission has rejected certain provisions in many of these contracts and directed U S WEST to remedy its failure to comply with Commission orders in any future filing.

5. U S WEST's application for approval states that it "is in conformance with prior decisions of this Commission, is in the public interest, and does not discriminate against other telecommunications carriers." This agreement is not the same as prior resale agreements, although it appears to include substantially the same content as those prior agreements. For the

reasons explained below, the Commission approves the Agreement in part and rejects several sections of the Agreement which are not consistent with prior Commission decisions.

**Applicable Law and Commission Decision**

6. The standards for approving an interconnection agreement differ, depending on whether the agreement has been voluntarily negotiated or has been arbitrated by a state commission. 47 U.S.C. § 252(e)(2). The Agreement submitted for approval in this proceeding was negotiated voluntarily by the parties and thus must be reviewed according to the provisions in 47 U.S.C. § 252(e)(2)(A).

7. Section 252(e)(4) of the 1996 Act provides that a negotiated agreement submitted for a state commission's approval must be approved or rejected within 90 days or it will be deemed approved. Thus, Commission approval or rejection according to the substantive standards set forth in the 1996 Act must issue by February 15, 2000, 90 days following the submission of the McLeod Agreement for Commission approval.

8. The Commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by voluntary negotiation:

> (2) GROUNDS FOR REJECTION.--The State commission may only reject--
>
> (A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(a)] if it finds that
>
> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
>
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

9. Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the Commission's authority is preserved in § 252 (e)(3) to establish or enforce other requirements of Montana law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to § 253 of the 1996 Act, which does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

10. Unlike an agreement reached through arbitration, a voluntarily negotiated agreement need not comply with standards set forth in §§ 251(b) and (c). Sections 251(b), 252(c) and 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in § 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission.

11. By approving this Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that §§ 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

12. No comments have been received that express any reservations about the parties' agreement not complying with federal law as cited above or with state telecommunications requirements. The Montana Consumer Counsel, who represents the consumers of the State of Montana, has not intervened in this approval proceeding, and has not filed comments to indicate that any portion of the agreement is not consistent with the public interest, convenience and

necessity. There have been no objections raised that the Agreement discriminates improperly or is not consistent with the public interest, convenience and necessity.

13. The Commission finds that the terms in the parties Agreement appear to conform to the standards required by the 1996 Act and should be approved, with certain exceptions. In this approval proceeding, the Commission is guided by provisions in state and federal law that have been enacted to encourage the development of competitive telecommunications markets. Section 69-3-802, MCA, for example, states that it is the policy of the State of Montana to encourage competition in the telecommunications industry and to provide for an orderly transition to a competitive market environment.

The Commission addresses the following terms:

14. Payment – In prior agreements, the Commission has rejected sections relating to payment of amounts due by resellers to U S WEST and sections relating to dispute resolution procedures because the sections were not consistent with the public interest. In particular, the Commission has rejected sections which may directly affect consumers because the agreements contained no provision for advance notification to the Commission so the Commission can take action if necessary to protect the interests of subscribers. The Agreement contains several sections which, when read together, raise questions whether the Commission would be notified in time to take necessary action.

15. The Commission is particularly concerned that, if payment by McLeod to U S WEST is not made pursuant to the terms of the agreement, McLeod's end user customers' local exchange service could be placed in jeopardy of being disconnected through no fault on their part. There is no specific provision for Commission notification as there has been in the amended agreements previously approved by the Commission and the sections in the Agreement

that relate to payment default are scattered throughout the agreement. The following sections of the Agreement relate to or affect the treatment of nonpayment by McLeod to U S WEST, and read in pertinent part:

> (A)3.12 Default: If either Party defaults in the payment of any amount due hereunder, or if either Party violates any other material provision of this Agreement, and such default or violation shall continue for thirty (30) calendar days after written notice thereof, the other party may seek relief in accordance with the Dispute Resolution provision of this Agreement. . . .
>
> (A)3.16.3 Dispute Resolution: . . . The Parties shall advise the Commission that they will be settling a dispute through arbitration as soon as reasonably possible and in every instance prior to retaining an arbitrator. The Parties shall file a copy of each arbitration opinion with the Commission within ten (10) days of service of same. . . . It is acknowledged that the Parties, by mutual, written agreement, may change any of these arbitration practices for a particular, some, or all dispute(s).

16. Dispute Resolution - The Commission has repeatedly concluded that the public interest and the facilitation of market entry is better served by a notification to the Commission that the parties intend to resolve disputes through an arbitrator who is not the Commission. Section (A)3.16.3, set forth in part above, provides that the parties may mutually agree to change the provisions for arbitration. The Commission interprets the last sentence in § (A)3.16.3 as allowing U S WEST and McLeod to mutually agree to provide no notification to the Commission. This is not consistent with the public interest, convenience and necessity, and is rejected.

17. At (B)5.4, under Billing, the Agreement reads, "USW may disconnect for the failure by McLeodUSA to make full payment for the resold services provided under this Agreement within sixty (60) calendar days of the due date on McLeodUSA's bill. McLeodUSA will pay the Tariff charge required to reconnect each end user line disconnected pursuant to this paragraph." As in prior agreements, this section contains no provision for notification to the

Commission of a pending disconnection of service to an indeterminable number of end users. U S WEST must follow certain Commission rules prior to terminating service to its own end users--as must McLeod. If notified of a pending termination of service to McLeod□s customers, the Commission can act appropriately. It is not consistent with the public interest to permit U S WEST to terminate service to McLeod□s end users with no notification to the Commission. The parties are directed to add the following language to this section, language taken from the U S WEST/Topp Comm, Inc. Interconnection Agreement, section (B)5.4, Commission Docket No. D99.3.77:

> "If USW elects to disconnect [McLeod] pursuant to this Section, USW will notify [McLeod] and the Commission of such disconnection ten (10) days prior to the effective date of the disconnection. Immediately upon receipt of such notice, [McLeod] shall notify its end user customers that service will be disconnected on the date specified in USW's notice to [McLeod] for [McLeod's] failure to make payments due hereunder. [McLeod] shall not disparage USW or make otherwise false or misleading statements about USW or the disconnection in [McLeod's] notice to its end user customers. USW will not disconnect an end user customer without first obtaining the approval of the Commission."

The Commission requires this language because it is in the public interest to take the steps required therein to protect McLeod customers in case U S WEST notifies McLeod of a pending disconnection.

18. The Commission notes the following language in section (B)4.1, <u>Ordering Process</u>: "McLeodUSA's end users contacting USW will be instructed to contact McLeodUSA; however, nothing in this Agreement, except as provided below, shall be deemed to prohibit USW from discussing its products and services with McLeodUSA's end users who call USW." This language may be in conflict with ARM 38.5.4116, perhaps especially ARM 38.5.4116(1)(c). McLeod and U S WEST can agree that nothing in their Agreement prohibits certain conduct, but

if that conduct otherwise violates the law, the provision in the Agreement that sanctions such conduct is void. §§ 28-2-604, 28-2-701, 28-2-702, MCA. Any provision or term of this Agreement that is in conflict with the law, whether or not specifically addressed by the Commission, is rejected as a matter of law and not in the public interest.

## Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. McLeod intends to resell telecommunications services and interconnect with U S WEST in U S WEST territories throughout Montana. As a reseller of regulated telecommunications services in Montana, McLeod is subject to Commission authority to supervise, regulate and control public utilities. Section 69-3-803(6), MCA.

3. Before providing services in Montana, McLeod initially will be required to register with the Commission as a telecommunications provider and to provide the requested information to the Commission, if it has not already done so. Section 69-3-805, MCA. In addition, § 69-3-805(1)(e) requires McLeod to file initial price lists or tariffs for regulated telecommunications services or to request that filing of such tariffs or price lists be waived by the Commission.

4. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

5. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally,* the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the* Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

6. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

7. The Commission has jurisdiction to approve the resale agreement negotiated by the parties and submitted to the Commission for approval according to § 252(e)(2)(A). Section 69-3-103, MCA.

8. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the McLeod Agreement February 15, 2000, or the Agreement will be deemed approved.

**<u>Order</u>**

THEREFORE, based upon the foregoing, it is ORDERED that the resale agreement of the parties, submitted to this Commission for approval pursuant to the 1996 Act, is approved as discussed herein, subject to the following condition:

1. The parties shall file an amendment to this agreement consistent with this Order within 30 days.

2. The parties shall file all subsequent amendments to the Agreement with the Commission for approval pursuant to the 1996 Act.

DONE AND DATED this 15th day of February, 2000, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

GARY FELAND, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.